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Constitutional Law - Personal, Civil, and Political Rights: The Rights of the Disabled to Physical and Legal Access to the Courts Is Upheld under Title II of the Americans with Disabilities Act - Tennessee v. Lane

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CONSTITUTIONAL LAW—PERSONAL, CIVIL, AND POLITICAL RIGHTS: THE RIGHTS OF THE DISABLED TO PHYSICAL AND LEGAL ACCESS TO THE COURTS IS UPHELD UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Tennessee v. Lane, 541 U.S. 509 (2004)*

I. FACTS

In September 1996, George Lane was called to appear at a county courthouse in a criminal proceeding.[1] Lane was charged with driving with a revoked license and possessing prescription medication.[2] In an unrelated incident, he had been seriously injured and lost one of his legs in an automobile accident.[3] As a result, he was confined to a wheelchair and unable to walk or climb stairs.[4] The courthouse in Benton, Polk County, Tennessee was on the second floor and the building had no elevator.[5] Consequently, Lane was forced to physically drag himself to the second floor courtroom by crawling up the steps.[6] In a subsequent, mandatory court appearance regarding the same set of charges, Lane refused to crawl up the stairs to the second floor courtroom or to be assisted up the stairs by officers of the court.[7] Lane claimed that if he would have allowed court officers to assist him by carrying him up the stairs to the second floor, he would be putting his safety at risk.[8] Lane refused to agree to hold the preliminary hearing for his case in the courthouse's first floor library and also refused the court's offer to hold any subsequent proceedings in an accessible courtroom in another county.[9] Consequently, he was arrested and jailed for failure to appear.[10]

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*Winner of a North Dakota State Bar Foundation Outstanding Note/Comment Award.

1. Brief for the Private Respondents at 4, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667).

2. John A. MacDonald, *Fighting For Access Rights: Tennessee Case Pits Disabilities Act Against 11th Amendment*, HARTFORD COURANT, Jan. 11, 2004, at A1, *available at* 2004 WL 58832780.

3. *Id.*

4. Private Respondents' Brief at 4, *Lane* (No. 02-1667).

5. Petitioner's Reply Brief at 3, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667).

6. Private Respondents' Brief at 4, *Lane* (No. 02-1667).

7. Tennessee v. Lane, 541 U.S. 509, 514 (2004).

8. Private Respondents' Brief at 5, *Lane* (No. 02-1667).

9. Petitioner's Reply Brief at 3-4, *Lane* (No. 02-1667).

10. *Lane*, 541 U.S. at 514.

Like George Lane, Beverly Jones suffered from mobility impairments and used a wheelchair.[11] Jones was employed as a professional court reporter. [12] She claimed that a large number of Tennessee courthouses were inaccessible to her due to physical barriers, and as a result, she has been unable to work and has lost employment in Trousdale, Jackson, Clay, and Pickett counties.[13] Jones claims that she requested modifications to accommodate her disability in the four above-named Tennessee counties, but none of the requests were granted.[14] On one occasion, Jones accepted the assistance of others and allowed herself to be carried to some courtrooms, but "lost patience after she had to be carried to an inaccessible restroom by a judge."[15]

George Lane and Beverly Jones separately filed suit against the state of Tennessee and a number of individual Tennessee counties on August 10, 1998.[16] Lane and Jones claimed Tennessee was liable for "past and ongoing violations" of Title II of the Americans With Disabilities Act ("ADA").[17] Both Lane and Jones, as paraplegics confined to wheelchairs, asserted that they were denied physical and legal access to the state court systems by reason of their disabilities.[18]

Tennessee moved to dismiss Lane and Jones' original suits on the grounds that state sovereign immunity, granted to the state under the Eleventh Amendment to the United States Constitution, protected it from suit.[19] The District Court denied the motion, and Tennessee appealed the decision.[20] The United States intervened to defend Title II's valid abrogation of Tennessee's Eleventh Amendment immunity challenge.[21] However, Tennessee's appeal was stayed when the United States Supreme

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11. Private Respondents' Brief at 5, *Lane* (No. 02-1667).

12. *Id.*

13. Petition for Writ of Certiorari at 3-4, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667).

14. Private Respondents' Brief at 6, *Lane* (No. 02-1667).

15. MacDonald, *supra* note 2, at A1.

16. Private Respondents' Brief at 6-7, *Lane* (No. 02-1667); *see also* Petitioner's Reply Brief at 2 n. 1, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667) (explaining that the four other plaintiffs mentioned in private respondents' brief, Ann Marie Zappola, Ralph E. Ramsey Sr., Dennis Cantrel, and A. Russel Larson, were joined as parties to the original lawsuit in the district court action *after* Tennessee moved for dismissal, and consequently, their claims were not part of the appeal to the Sixth Circuit, and were not at issue in the petition to the Supreme Court).

17. *Lane*, 541 U.S. at 513; *see also* 42 U.S.C. §§ 12131-12165 (2000) (setting forth the provisions of Title II of the ADA).

18. Private Respondents' Brief at 3-4, *Lane* (No. 02-1667). Respondents cited twenty-three separate Tennessee counties in which portions of the courthouse were inaccessible. *Id.*

19. *Lane*, 541 U.S. at 514.

20. *Id.*

21. *Id.*

Court heard arguments in *Board of Trustees of University of Alabama v. Garrett*.[22] In Garrett, the Court determined that the Eleventh Amendment barred private lawsuits seeking monetary relief for violations of Title I of the ADA,[23] but did not decide the validity of claims under Title II.[24]

Following *Garrett*, the Sixth Circuit Court of Appeals heard arguments in *Popovich v. Cuyahoga County Court of Common Pleas*.[25] In *Popovich*, the plaintiff brought suit against the state for Title II violations for failing to provide him with a hearing assistance device in the plaintiff's child custody case.[26] The *Popovich* court held that when a Title II claim is based on due process rather than equal protection grounds, Congress may validly abrogate a state's sovereign immunity under the power granted to it by Section 5 of the Fourteenth Amendment.[27] Tennessee filed for a rehearing, arguing that *Popovich* was not controlling because Lane and Jones' original complaints did not allege a due process violation.[28] The Sixth Circuit declined to adopt Tennessee's argument, and affirmed the decision to deny Tennessee's motion.[29] The court held that because the right of access to the courts is a fundamental right guaranteed by the Due Process Clause, Title II was a proper, reasonable remedy to correct the widespread constitutional violation of denying individuals with disabilities access to the court system.[30] However, the Sixth Circuit did not altogether reject the State's argument and remanded the case for further proceedings.[31] The court noted that the case contained issues that could not be resolved "absent a factual record."[32]

The United State Supreme Court granted certiorari.[33] The *Lane* Court affirmed the judgment of the circuit court and held that Title II of the ADA,

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22. 531 U.S. 356 (2001).

23. *See* 42 U.S.C. §§ 12111-12117 (2000) (setting forth Title I, which prohibits discrimination against the disabled in the employment context). The general prohibition clause states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112.

24. *Lane*, 541 U.S. at 514.

25. 276 F.3d 808 (6th Cir. 2002) (*en banc*).

26. *Popovich*, 276 F.3d at 811.

27. *Id.* at 815.

28. *Lane*, 541 U.S. at 515.

29. *Id.* at 514-15.

30. Lane v. Tennessee, 315 F.3d 680, 682-83 (6th Cir. 2003).

31. *Lane*, 541 U.S. at 515.

32. *Id.*

33. Tennessee v. Lane, 539 U.S. 941 (2003). The order granting certiorari limited the issue to be heard, however, to Question One in the Petition. *Id.* Question One asked "Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress's authority under Section 5 of the Fourteenth Amendment, thereby failing validly to

as it applied to the "fundamental right of access to the courts, constitutes a valid exercise of Congress's Section 5 authority to enforce the guarantees of the Fourteenth Amendment."[34]

II. LEGAL BACKGROUND

Title II of the Americans With Disabilities Act ("ADA") applies to a state sovereign as a provider of public programs, services, or activities.[35] However, holding a state sovereign liable under Title II conflicts with a state's sovereign immunity under the Eleventh Amendment.[36] Eleventh Amendment immunity may be either given up by the state voluntarily, or validly abrogated only pursuant Section 5 of the Fourteenth Amendment to enforce the amendment's substantive guarantees.[37] The constitutionality of remedial Section 5 legislation is determined by applying the congruent and proportional test.[38] The congruent and proportional test was then later refined and specifically applied to an action involving Title I of the ADA.[39]

A. DISCRIMINATION AGAINST THE DISABLED AND THE AMERICANS WITH DISABILITIES ACT.

The ADA passed by large majorities in both houses of the United States Congress, was enacted in 1990 to remedy the widespread, pervasive discrimination faced by individuals with disabilities.[40] Discrimination "tended to isolate and segregate individuals with disabilities" and was a "serious and pervasive social problem."[41] Disabled individuals had "no legal recourse to redress discrimination" unlike individuals discriminated against on the basis of race, color, sex, or national origin.[42] Congress provided extensive documentation of its findings of such discrimination in

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abrogate the states' Eleventh Amendment immunity from private damage claims." Petition for Writ of Certiorari at i, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667).

34. *Lane*, 541 U.S. at 533-34.

35. 42 U.S.C. §§ 12131-12165 (2000).

36. *See* U.S. CONST. amend. XI (providing the general grant of state sovereign immunity from suit).

37. *See* Clark v. Barnard, 108 U.S. 436, 447 (1883) (providing that a state may voluntarily surrender its sovereign immunity if it chooses); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (stating that Section 5 of the Fourteenth Amendment is the only valid constitutional basis under which Eleventh Amendment immunity may be abrogated).

38. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

39. Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365, 368 (2001).

40. Tennessee v. Lane, 541 U.S. 509, 516 (2004).

41. 42 U.S.C. § 12101(a)(2) (2000).

42. *Id.* § 12101(a)(4).

its consideration of the legislation.[43] Congress reached these conclusions after it held thirteen committee hearings, established a task force which held public forums and discussed the problem of inaccessible courthouses, and collected testimony from over 5,000 individuals claiming they had been the victim of discrimination at the hands of state and local governments. [44]

Claims of discrimination by the state against the disabled were well litigated both before and after passage of the ADA. States were found to have wrongfully committed disabled individuals to mental hospitals, to have wrongfully confined and restrained disabled patients within state-run mental hospitals, and to have failed to provide disabled prisoners with adequate, accessible restroom facilities.[45] Cases have also documented discrimination against the disabled in access to public education where, for example, the mentally retarded were either segregated from the general public school population or were excluded from public schools altogether.[46] Additionally, public voting sites were found to be physically inaccessible to individuals in wheelchairs.[47] Discrimination against the disabled in the context of actual legal or physical access to the judicial system was also

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43. *See, e.g.*, H.R. Rep. 101-485 (III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 (presenting a sampling of Congress's findings). The House report cited a number of surveys, including one by Louis Harris and Associates, noting that people with disabilities are poorer, have less education, and are socially and economically disadvantaged. *Id.* at 447-48. However the long-standing problems faced by the disabled were likely the result of outdated stereotypes, misperceptions, and "discriminatory policies and practices" towards people with disabilities. *Id.* at 448. These discriminatory practices affected the every day lives of the disabled in every area including securing employment, participating in their communities, obtaining custody of their children, and "enjoying all of the rights that Americans take for granted." *Id.*

44. Brief for the United States at 16-17, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667) (citing *Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment* 16 (1990) [hereinafter Task Force Report], *Staff of the House Comm. On Educ. and Labor*, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: Americans With Disabilities Act 1040 (Comm. Print 1990)).

45. *See* Jackson v. Indiana, 406 U.S. 715, 730 (1972) (holding that application of different commitment and release standards to disabled individuals in a state-run mental hospital is an equal protection violation); Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (determining that residents of a mental hospital have a constitutional right to be free from restraint by the hospital's employees); LaFaut v. Smith, 834 F.2d 389, 393-94 (4th Cir. 1987) (concluding that prison officials wrongly forced a disabled prisoner to use a catheter rather than providing him accessible restroom facilities, and did not provide him with timely, necessary physical therapy and medical attention). *See also* Schmidt v. Odell, 64 F. Supp. 2d 1014, 1016 (D. Kan. 1999) (providing a post-ADA claim by a prisoner forced to crawl on the floor because his cell was wheelchair inaccessible).

46. *See* N.Y. State Assn. for Retarded Children, Inc. v. Carey, 466 F. Supp. 487, 504-05 (E.D.N.Y. 1979) (holding the local school board's plan to segregate mentally retarded children from the general school population to be unconstitutional); Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972) (explaining that failure to provide "exceptional" children with publicly supported education was a violation of the United States Constitution, the laws of the District of Columbia, and the regulations of the school board itself).

47. New York *ex rel* Spitzer v. County of Delaware, 82 F. Supp. 2d 12, 13 (N.D.N.Y. 2000).

well documented. For example, in *Matthews v. Jefferson*,[48] a court forced a litigant scheduled to appear at a hearing to be carried up the stairs to a second floor courtroom rather than move the hearing to a different room.[49] The court held that the state was in violation of the ADA not only for the failure to consider moving the hearing to an accessible room, but also for failing to make arrangements to help the litigant to the first floor during the lunch break, failing to allow him access to a wheelchair accessible restroom, and failing to make arrangements to bring him to the first floor at the conclusion of the day's proceedings.[50] In addition to the actual physical exclusion, some lower courts found the state or local governments to have improperly and categorically excluded individuals with disabilities, such as blindness, from even participating in the judicial process by serving on juries.[51]

Title II of the ADA addresses such discrimination in physical and legal access to public services, programs, and activities.[52] The section defining discrimination provides that "no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[53] To be considered a qualified individual with a disability, a person must "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[54] A public entity includes "any State or local government," and any "department, agency, special purpose district, or other instrumentality of a State or States or local government."[55] The question of whether Title II of the ADA allows individuals to bring suit for damages against a state governmental entity for violations of Title II

48. 29 F. Supp. 2d 525 (W.D. Ark. 1998).

49. *Matthews*, 29 F. Supp. 2d at 533; *see also* Layton v. Elder, 143 F.3d 469, 472-73 (8th Cir. 1998) (holding that the state violated the ADA and denied wheelchair bound litigants access to the courthouse because of the physically inaccessible second floor courtroom, inadequate restrooms to accommodate a wheelchair, and lack of handicapped parking spaces outside the courthouse, even though the state attempted to accommodated the litigants by holding the hearing being attended in a first-floor hallway).

50. *Id.* at 533-34.

51. Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1292 (9th Cir. 1982).

52. 42 U.S.C. §§ 12131-12165 (2000).

53. *Id.* § 12132.

54. *Id.* § 12131(2).

55. *Id.* § 12131(1)(A)-(B).

necessarily implicates the constitutional protection of state sovereign immunity under the Eleventh Amendment to the United States Constitution.

B. ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment states, "the [j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens . . . or Subjects of any Foreign State."[56] Strictly read, the text of the amendment only prohibits suits by citizens of one state against another state. However, it has long been interpreted to also prevent citizens from filing suit against the state in which they reside.[57] The concept of state sovereign immunity pre-dates not only the passage of the Eleventh Amendment but also the Constitution itself and "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[58]

State sovereign immunity is not absolute.[59] The Eleventh Amendment protection does not apply when the defendant is a "non-state governmental entity"[60] such as a county or city government or where the defendant is an officer or agent of the state;[61] where the suit is by another state or by the United States against a separate individual state;[62] or when the suit is for

56. U.S. CONST. amend. XI.

57. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72-73 (2000) (asserting that the Eleventh Amendment has been long interpreted to also prohibit suits by individuals against the state in which they are a citizen); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (affirming that individuals may not sue a state not explicitly subjecting itself to suit); Hans v. Louisiana, 134 U.S. 1, 15 (1890) (maintaining that suits by a citizen against their own state was not included in the Eleventh Amendment primarily because it was not allowable at common law prior to the Constitution's adoption).

58. Alden v. Maine, 527 U.S. 706, 713 (1999).

59. *See id.* at 756 (explaining that the protection of the Eleventh Amendment does not apply to a "municipal corporation" or other non-state governmental entity).

60. *See* Seth A. Horvath, Note, *Disentangling the Eleventh Amendment and the Americans With Disabilities Act: Alternative Remedies For State-Initiated Disability Discrimination Under Title I and Title II*, 2004 U. ILL. L. REV. 231, 235-36 (2004) (clarifying the Eleventh Amendment's inapplicability to non-state governmental units such as a city or county government). *But see* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (setting forth the rule that for purposes of administering the court system, state and local courts are treated as an arm of the state).

61. *See Alden*, 527 U.S. at 756-57 (providing that a plaintiff may seek money damages against a state officer for constitutional violations conducted in that officer's individual capacity, if the relief is sought from the officer, not from the state treasury).

62. *Id.* at 755.

injunctive relief against a state officer to prevent that officer from acting in contradiction to protections under the United States Constitution.[63]

However, the two most important ways in which the Eleventh Amendment does not apply to the states include voluntary surrender of immunity, and involuntary abrogation of the immunity which requires Congress to express its intent to do so, and to act pursuant to a valid exercise of a grant of constitutional authority.[64]

1. *Consent to or Waiver of Eleventh Amendment Immunity*

Eleventh Amendment immunity is a "personal privilege which [the state] may waive at [its] pleasure."[65] In rare instances, a state will voluntarily give up the protections of the Eleventh Amendment and consent to being sued by private parties.[66] For example, a state may decide that it is sound public policy to provide a private right of action to its citizens against the state.[67]

A state waives its protections under the amendment when it invokes the jurisdiction of a federal court, or if the state makes a clear, distinct proclamation that it intends to submit itself to the court's jurisdiction.[68] The consent to suit or immunity waiver requirement is so specific that a state may not give up the immunity merely by subjecting itself to suit in state court, by making a general statement that it intends to "sue and be sued," or by having a general policy of allowing lawsuits against it in "any court of competent jurisdiction."[69]

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63. *See Ex Parte* Young, 209 U.S. 123, 150-51 (1908) (stating injunctions may be issued to prevent an officer from "executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant").

64. *See* Seminole Tribe of Fla. v. Florida, 517 U.S 44, 54, 57 (1996) (emphasizing that sovereignty requires a state not be subject to suit by an individual without that state's consent). *See also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (stating that whether the Eleventh Amendment is validly abrogated is determined by a two-part test); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (stating that the main basis for Eleventh Amendment abrogation is enforcement of the Fourteenth Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that state sovereign immunity may not be abrogated unless done so pursuant to a valid grant of constitutional authority).

65. Clark v. Barnard, 108 U.S. 436, 447 (1883).

66. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (quoting *Barnard*, 108 U.S. at 447-48) (offering examples of when a state may waive its Eleventh Amendment immunity).

67. Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1184 (2002).

68. *Fla. Prepaid*, 527 U.S. at 675-76.

69. *Id.* at 676 (citing Fla. Dep't of Health and Rehabilitative Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981) (*per curiam*)).

Furthermore, a state may not impliedly waive its immunity.[70] Under the now discredited "constructive waiver" doctrine, a state gave up its immunity by merely being a party to or present in a subject regulated by Congress.[71] In *Parden v. Terminal Railway of Alabama Docks Department*,[72] for example, the court allowed employees of a state-owned railroad to bring suit against the railroad under the Federal Employers' Liability Act ("FELA"),[73] even though the statute contained no specific reference to abrogation of immunity.[74] However, *Parden* was considered "an anomaly" and was later expressly overruled.[75] The underpinnings of the *Parden* decision were not reconcilable with the line of cases requiring that the voluntary surrender of a state's sovereign immunity be express and unequivocal.[76] In *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*,[77] the Court found a "fundamental difference" between a state voluntarily giving up immunity and a state giving up immunity merely by taking certain action.[78] Without an express, unequivocal statement of consent, constructive waiver was tantamount to abrogation: "[f]orced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin."[79] Therefore, only when a state makes a clear, explicit statement of its intent to submit itself to the jurisdiction of a court can its Eleventh Amendment immunity be waived.[80]

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70. *Id.*

71. *Id.* at 680.

72. 377 U.S. 184 (1964).

73. 45 U.S.C. § 51 (2000).

74. *Parden*, 377 U.S. at 192. FELA contains only the general statement that every state was subject to suit if it owned or operated a railroad carrier that engaged in interstate commerce. 45 U.S.C § 51.

75. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999).

76. *Id.*

77. 527 U.S. 666 (1999).

78. *Fla. Prepaid*, 527 U.S. at 680-81. The Court believed that the constructive-waiver experiment of *Parden* was ill conceived, and [saw] no merit in attempting to salvage any remnant of it . . . *Parden* broke sharply with prior cases, and [was] fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration.

Id.

79. *Id.* at 683.

80. *Id.* at 675-76.

2. *Forced, Unconsenting Abrogation of Eleventh Amendment Immunity*

Sovereign immunity may also be abrogated from an unconsenting state.[81] Abrogation occurs when Congress has (1) "unequivocally expressed its intent to abrogate that immunity," and, (2) acts "pursuant to a valid grant of constitutional authority."[82]

a. *Expression of Intent to Abrogate Immunity*

Eleventh Amendment sovereign immunity may only be abrogated when Congress makes its intention to "abrogate the States' constitutionally secured immunity from suit in federal court...unmistakably clear in the language of the statute."[83] In most instances, the requirement is easily fulfilled. In *Kimel v. Florida Board of Regents*,[84] for example, the expression of intent stated in the Age Discrimination in Employment Act ("ADEA") was deemed valid.[85] Under the ADEA, employees could maintain an action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."[86] The term "public agency" included any state government, political subdivision of a state government, or any agency or political subdivision of a state.[87]

In *Nevada Department of Human Resources v. Hibbs*,[88] the Court considered the constitutional validity of the Family and Medical Leave Act ("FMLA") of 1993.[89] The *Hibbs* Court concluded that the congressional intent to abrogate state immunity was unmistakable, as the FMLA contained identical abrogation language to the comparable language contained in the ADEA, deemed acceptable by the Court in *Kimel*.[90]

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81. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

82. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

83. Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

84. 528 U.S. 62 (2000).

85. *Kimel*, 528 U.S. at 78; *see* 29 U.S.C. § 623(a)(1) (2000) (*overruled* in part, by *Kimel*, 528 U.S. at 79). The ADEA is no longer valid as it applies to the state or a state department or agency as an employer. *Kimel*, 528 U.S. at 79. The ADEA as applied to the state was invalid because it relied "solely on Congress'[s] Article I commerce power" as its valid grant of constitutional authority. *Id. See also Kimel*, 528 U.S. at 73-74 (quoting the expression of intent to abrogate language in the ADEA and determining that such language sufficiently demonstrated Congress's intent to abrogate state sovereign immunity).

86. *Id.* (quoting 29 U.S.C. § 216(b) (2000)).

87. *Id.* at 74. (quoting 29 U.S.C. § 203 (x) (2000), which was overruled by the *Kimel* court's decision only as the statute applied to the state as an employer).

88. 538 U.S. 721, 726 (2003).

89. *Hibbs*, 538 U.S. at 726.

90. *See* 29 U.S.C. § 2617(a)(2) (2000) (asserting the immunity abrogation provision of the FMLA).

b. *Valid Grant of Constitutional Authority*

Historically, two portions of the Constitution served as grounds on which the federal government bases abrogation of state sovereign immunity: (1) the Interstate Commerce Clause [91] and (2) Section 5 of the Fourteenth Amendment.[92]

The foundation for the use of the Interstate Commerce Clause as a basis for abrogation was somewhat shaky, as the only case ever to rely on it was overruled.[93] In *Pennsylvania v. Union Gas Company*,[94] Pennsylvania challenged an order to pay for cleanup costs and assessment of money damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[95] Writing for the plurality, Justice Brennan wrote that Congress's power to regulate commerce included the authority to directly limit a state's assertion of sovereign immunity.[96] The Interstate Commerce Clause was held a valid abrogation basis because it both granted power to Congress while taking away power from the states and did so in one step, rather than in the two steps in which it was accomplished by Section 5 of the Fourteenth Amendment.[97] The *Union Gas* Court continued by stating that Congressional power would be limited if it also did not have the power to subject a state to liability for damages for a violation of a law passed by Congress effecting interstate commerce.[98] Further, the Court stated that a state subjected itself to abrogation of state sovereign immunity by implication when it ratified the Constitution and subsequently ratified the Eleventh Amendment.[99]

However, seven years later in *Seminole Tribe of Florida v. Florida*,[100] the Court expressly overruled *Union Gas Co.* and prohibited the future use of any portion of the Commerce Clause as a basis for abrogation of state

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91. *See* U.S. CONST. art. I, § 8, cl. 3 (stating Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *see also* Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 192 (1964) (relying on Congress's Article I power as a valid abrogation basis).

92. U.S. CONST. amend. XIV § 5; *see also*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (relying on Section 5 as its basis for abrogation of state sovereign immunity).

93. Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989), *overruled* by Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996).

94. 491 U.S. 1 (1989).

95. *Union Gas Co.*, 491 U.S. at 5-6.

96. *Id.*

97. *Id.* at 16-17. *See infra* Part II (C) (discussing Section 5 of the Fourteenth Amendment).

98. *Id.* at 20.

99. *Id.*

100. 517 U.S. 44 (1996).

sovereign immunity.[101] In the case, the Seminole Native Americans sued Florida and the state's governor for violating the Indian Gaming Regulatory Act ("IGRA").[102] The Tribe claimed that Florida violated the IGRA's good faith negotiation requirement when the state refused to negotiate on including certain gaming activities in the gaming compact between the two parties.[103] The *Seminole Tribe of Florida* Court held that neither the Indian Commerce Clause nor the Interstate Commerce Clause were sufficient constitutional authority because the Court's decision in *Union Gas Co.* stood in contradiction to the court's prior federalism jurisprudence, especially the *Hans v. Louisiana*[104] decision prohibiting suit against states without their consent.[105] The court pointed out that in none of the Court's decisions prior to *Union Gas Co.* had they "suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment."[106] Additionally, the Court emphasized the fact that the *Union Gas Co.* decision was not a majority, but a plurality and that there was no common rationale underpinning the court's decision.[107]

In criticizing the *Union Gas Co.* plurality decision, Chief Justice Rehnquist wrote in *Seminole Tribe of Florida* that "[a]s the dissent in Union Gas recognized, the plurality's conclusion—that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III—'contradict[ed] our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal-court jurisdiction.'"[108] Finally, the *Seminole Tribe of Florida* Court criticized what it viewed as the over-reliance on *Fitzpatrick v. Bitzer*.[109] The *Fitzpatrick* decision was based upon a rationale "wholly inapplicable to the Interstate Commerce Clause."[110] Again citing Justice Scalia's dissent in *Union Gas Co.*, the Court explained that *Fitzpatrick* could not justify a "limitation of the

101. *Seminole Tribe of Fla.*, 517 U.S. at 76. *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) (reaffirming the holding of *Seminole Tribe of Fla.*).

102. *Seminole Tribe of Fla.*, 517 U.S. at 51-52; *see* 25 U.S.C. §§ 2701-2721 (2000) (providing the text of the IRGA).

103. *Seminole Tribe of Fla.*, 517 U.S. at 51-52.

104. 134 U.S. 1 (1897).

105. *Seminole Tribe of Fla.*, 517 U.S. at 63-64.

106. *Id.* at 65.

107. *Id.* at 66.

108. *Id.* at 65 (quoting *Union Gas Co.*, 491 U.S. at 39 (Scalia, J., dissenting)).

109. 427 U.S. 445 (1976).

110. *Seminole Tribe of Fla.*, 517 U.S. at 65.

principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution."[111]

In sum, the Eleventh Amendment protects a state or state-entity from suit by private individuals within and outside the individual state.[112] This immunity may either be waived by an explicit statement of the intent to do so by the state, or by abrogation or forced waiver of the state sovereign immunity.[113] Abrogation or forced waiver can only occur when Congress has made an explicit statement of its intent to abrogate, and when it acts pursuant to a valid grant of constitutional authority.[114] Although Congress's Article I Commerce Clause power was once used as such a basis, the Court's decision in *Seminole Tribe of Florida* has since prohibited reliance on the Commerce Clause as a valid grant of constitutional authority.[115] Only Section 5 of the Fourteenth Amendment is a sufficient grant of constitutional authority allowing for abrogation of state immunity.[116]

C. SECTION 5 OF THE FOURTEENTH AMENDMENT: THE ONLY VALID BASIS FOR STATE SOVEREIGN IMMUNITY ABROGATION

Section 5 of the Fourteenth Amendment provides Congress with the appropriate enforcement mechanism to enforce the amendment's substantive guarantees, stating that "[t]he Congress shall have power to enforce by appropriate legislation, the provisions of this article."[117]

Section 1 of the Fourteenth Amendment provides those substantive guarantees, stating that:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[118]

In addition to disavowing any future reliance on the Interstate Commerce Clause as a constitutional basis for abrogation of state sovereign

111. *Id.* at 66 (quoting *Union Gas Co.*, 491 U.S. at 42 (Scalia, J., dissenting)); *see generally* Kristen Healy, Comment, *The Scope of Eleventh Amendment Immunity From Suits Arising Under Patent Law After* Seminole Tribe v. Florida, 47 AM. U.L. REV. 1735 (1998) (discussing immunity abrogation and the *Seminole Tribe of Fla.* decision).

112. *Hans*, 134 U.S. at 20.

113. *Seminole Tribe of Fla.*, 517 U.S. at 55.

114. *Kimel*, 528 U.S. at 73.

115. *Seminole Tribe of Fla.*, 517 U.S. at 59-66.

116. *Id.* at 59.

117. U.S. CONST. amend. XIV § 5.

118. U.S. CONST. amend. XIV, § 1.

immunity, *Seminole Tribe of Florida* also reaffirmed prior precedent that Congress could use Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.[119] One of the most important predecessor cases dealing with this use of Section 5 was *Fitzpatrick v. Bitzer*.[120] At issue in *Fitzpatrick* was whether Congress had the power to impose possible liability for money damages on a state government employer who had discriminated against an individual on the basis of race, color, religion, sex, or national origin in violation of the 1972 Amendments to Title VII of the Civil Rights Act of 1964.[121] The *Fitzpatrick* Court held that Congress was not barred from abrogating a state's Eleventh Amendment immunity when it does so based on a valid exercise of its power under Section 5 of the Fourteenth Amendment to enforce one of the substantive provisions of the amendment.[122] The *Fitzpatrick* Court further determined that the terms of the amendment itself "embody limitations on state authority" and Congress may determine what constitutes "'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment."[123] Since *Fitzpatrick*, numerous decisions have upheld this affirmative grant of power under Section 5.[124]

1. *Scope and Limits of the Congress's Power to Proscribe Remedial Section 5 Legislation*

Congress has wide latitude in proscribing legislation to enforce the substantive guarantees of the Fourteenth Amendment.[125] Previously, the text and construction of the Fourteenth Amendment were held to be "inconsistent" with Congress's ability to define what restrictions were

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119. *Seminole Tribe of Fla.*, 517 U.S. at 59; *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (disavowing the use of the Commerce Clause as a basis for abrogation of state sovereign immunity and reaffirming *Seminole Tribe of Fla.*); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000) (explaining that only Section 5 "grant[s] Congress the authority to abrogate the States' sovereign immunity.").

120. 427 U.S. 445 (1976).

121. *Fitzpatrick*, 427 U.S. at 447-48.

122. *Id.* at 456.

123. *Id.*

124. *See e.g.*, Nev. Dept. of Human Res. v. Hibbs, 538 U.S., 721, 727 (2003) (explaining that Congress may use Section 5 of the Fourteenth Amendment to limit a state's Eleventh Amendment protections); *Garrett*, 531 U.S. at 364 (holding that while Congress may not rest the basis for its abrogation of state immunity on Article I, it may use Section 5 of the Fourteenth Amendment); Coll. Sav. Bank v. Fla. Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666, 672 (stating that "appropriate" legislation can abrogate state sovereign immunity pursuant only to the Enforcement Clause of the Fourteenth Amendment); *Kimel*, 528 U.S. at 80 (quoting *Fitzpatrick* and reaffirming that state sovereign immunity is limited by the Fourteenth Amendment); Alden v. Maine, 527 U.S. 706, 755-56 (1999) (affirming Congress's power to authorize "private suits against nonconsenting states" based on its Section 5 "enforcement power").

125. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

placed on the states by the Fourteenth Amendment.[126] However, the scope of Congress's Section 5 power allows it to enact any

> legislation [that] is appropriate...adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[127]

Enforcing the guarantees of the Fourteenth Amendment also necessitates that Congress be able to proscribe and prohibit a "broader swath of conduct, including that which is not itself forbidden by the Amendment's text" in legislation.[128]

Congress's enforcement power is not unlimited.[129] The power only applies to Section 5 legislation that is preventative or remedial.[130] The line between redefining substantive guarantees and what is remedial legislation can be tenuous.[131] In *South Carolina v. Katzenbach*,[132] for example, several provisions of the Voting Rights Act of 1965 were upheld because of the strong evidence of deliberate, systematic discrimination by several states against those of a particular racial group in the voting process through means such as literacy tests or property ownership requirements.[133] The *Katzenbach* Court found that the Voting Rights Act's prohibition against the use of any "test" or screening device to determine voting eligibility was a remedial measure taken to preserve the constitutional right to vote regardless of one's "race, color, or previous condition of servitude."[134] The

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126. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

127. *Id.* at 517-18 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1880)).

128. *Kimel*, 528 U.S. at 81.

129. *Boerne*, 521 U.S. at 519.

130. *Id.*

131. *Id.*

132. 383 U.S. 301 (1966).

133. *Katzenbach*, 383 U.S. at 319-20, 333-34. In South Carolina when the Voting Rights Act was enacted, for example, the state's statute required that in order to be eligible to vote, an individual was required to demonstrate that he or she "[c]an both read and write any section of [the State] Constitution submitted to [him] by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more." *Id.* (citing S.C. CODE ANN. § 23-62(4) (1965 Supp.) (alteration in original)).

134. *Katzenbach*, 383 U.S. 319-20 (quoting U.S. CONST. amend. XV). *But see* Oregon v. Mitchell, 400 U.S. 112, 123-26 (1970) (declaring several of the 1970 Amendments to the Voting Rights Act of 1965 unconstitutional). Congress exceeded its Section 5 enforcement powers, and the 1970 amendments amounted to the decree of a substantive law by requiring all states to lower the minimum voting age from 21 to 18 for all state and local elections. *Id.* The "Fourteenth

Voting Rights Act was also buttressed by the long, well-documented history of racial discrimination in the voting process, and the record of ineffectiveness of the voting rights laws in place at the time of the law's passage.[135]

Congress has the authority to proscribe a wide-range of remedies, including conduct that is not specifically prohibited to cure violations of the substantive guarantees of the Fourteenth Amendment.[136] However, the enforcement by Congress must be preventative or remedial.[137]

2. *The Congruent and Proportional Test*

The Supreme Court developed the current "congruent and proportional" standard for determining the validity of Section 5 legislation in *City of Boerne v. Flores*.[138] In *Boerne*, the Catholic Archbishop of San Antonio, Texas was denied a building permit for a church construction project and sued the city under the Religious Freedom Restoration Act ("RFRA") of 1993.[139] The RFRA purported to eliminate unfair barriers or punishments that limited people from freely practicing their religion.[140] The *Boerne* Court found that Congress exceeded the scope of its authority when it enacted the RFRA.[141] The RFRA's mandate prohibiting the government from "substantially burden[ing]" a person's right to exercise their religion applied not just to the federal government and its branches, but also to any department, branch, or agency of any level of the government.[142] The Court stated that the RFRA was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior."[143]

As a result, the *Boerne* Court formulated a new legal standard to determine the validity of legislation affecting the Fourteenth

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Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications, in either state or federal elections." *Id.* at 154 (Harlan, J., concurring).

135. *Katzenbach*, 383 U.S. at 313-16.

136. *Id.* at 326.

137. *Boerne*, 521 U.S. at 519.

138. 521 U.S. 507 (1997).

139. *See Boerne*, 521 U.S. at 507 (declaring the RFRA contained in 42 U.S.C. §§ 2000bb-bb4 unconstitutional).

140. *Id.* at 513. The RFRA was adopted in direct response to the Supreme Court's decision in a religious discrimination case where members of a Native American church were fired from their jobs and subsequently denied unemployment benefits when they ingested peyote in a sacramental ceremony. Employment Div. Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 874 (1990).

141. *Boerne*, 521 U.S. at 536.

142. *Id.* at 515-16 (alteration in original).

143. *Id.* at 532.

Amendment.[144] The "congruence and proportionality" test states that Section 5 legislation is valid only if it exhibits a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[145] In order to be congruent and proportional, the measures enacted to remedy the constitutional violation must address the issue they claim to remedy, and must bear some sort of appropriate balance between the proposed remedy and the alleged constitutional violation.[146]

D. TITLE I OF THE ADA AND THE REFINEMENT AND APPLICATION OF THE CONGRUENT AND PROPORTIONAL TEST

Board of Trustees of the University of Alabama v. Garrett[147] concerned the question of whether a state as an employer was protected by the Eleventh Amendment from suit for money damages for alleged violations of Title I of the ADA.[148] The primary legal question at issue in *Garrett* was whether in enacting the ADA, specifically Title I, Congress exceeded the scope of its authority under Section 5 of the Fourteenth Amendment.[149] Title I prohibits discrimination in an employment setting against qualified individuals with a disability.[150]

Patricia Garrett was employed as the Director of Nursing, OB/Gyn/Neonatal services at the University of Alabama Birmingham hospital.[151] Her treatment for breast cancer required her to take substantial leave from her job.[152] Upon returning to work, Garrett was informed that she would have to take a demotion.[153] Milton Ash, also a respondent, suffered from chronic asthma and sleep apnea.[154] Ash requested that his employer, the Alabama Department of Youth Services, allow him to switch from nighttime to daytime shifts, and that they minimize his exposure to carbon monoxide and cigarette smoke.[155] The Department granted none of

144. *Id.* at 520.
145. *Id.*
146. *Id.* at 530.
147. 531 U.S. 356 (2001).
148. *Garrett*, 531 U.S. at 360.
149. *Id.* at 364-74.
150. 42 U.S.C. §§ 12111-12117 (2000).
151. *Garrett*, 531 U.S. at 362.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

Ash's requests.[156] Garrett and Ash both filed suit seeking money damages under Title I of the ADA, and their cases were consolidated on appeal.[157]

The *Garrett* Court reiterated that in order to validly abrogate a state's Eleventh Amendment sovereign immunity, a law must both explicitly state its intent to abrogate and must do so pursuant to a valid grant of constitutional authority under Section 5.[158] The court also reaffirmed the use of the "congruent and proportional" test.[159]

In applying the congruent and proportional test to Title I of the ADA, the *Garrett* Court broke down the standard into two additional sub-part requirements: (1) a narrow identification of the scope of the constitutional right at issue, and, (2) a determination of whether Congress identified a history or pattern of unconstitutional behavior that the law at issue is seeking to remedy.[160]

1. *Narrow Definition of the Constitutional Right at Issue*

The first step in applying the congruence and proportionality test was to narrowly identify and define the constitutional right Congress was seeking to enforce in enacting the legislation.[161] Identifying the constitutional right at issue in a Fourteenth Amendment inquiry required determining which of the three levels of constitutional scrutiny a court should apply in reviewing the classifications made in the law: (1) rational basis scrutiny[162] (2) intermediate scrutiny[163] or, (3) strict scrutiny.[164] In *Garrett*,

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156. *Id.*

157. *Garrett*, 531 U.S. at 363.

158. *Id.*

159. *Id.* at 365.

160. *Id.* at 365, 368.

161. *Id.* at 365.

162. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (reiterating that "legislative classification[s] must be sustained unless...'patently arbitrary' and bears no rational relationship to a legitimate governmental interest").

163. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (stating that a classification based on gender must serve an "important governmental objective" and the means chosen to achieve that objective must be "substantially related" to that objective) (citations and internal quotations omitted)). *See also* Nev. Dept. of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003) (maintaining that gender discrimination triggers some level of heightened scrutiny in the context of traditional roles in the home and workplace); *Frontiero*, 411 U.S. at 686 (explaining that sex classifications require heightened scrutiny because a "sex characteristic frequently bears no relation to ability to perform or contribute to society").

164. *See e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (emphasizing that legal classifications made on the basis of race, alienage, or national origin are rarely related to the "achievement of any legitimate state interest," and often reflect prejudice or animus); Adarand Constructors Inc. v. Pena, 515 U.S. 200, 235 (1995) (stating that there is "nothing new" about the idea that a racial classification may be made only for "compelling reasons"); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (explaining that a statute will survive an equal protection challenge unless it interferes with a fundamental right or

for example, the Court identified that disabled individuals, as a class of people, were not members of a suspect class like individuals belonging to a single racial group, nor were the disabled even a quasi-suspect class such as members of the same gender.[165] As a result, an adverse employment action by the State of Alabama or its related entity with regards to the disabled would be allowed as long as it met the minimum requirements of rational basis scrutiny.[166] Under rational basis scrutiny, a state need not produce precise reasoning behind passage of a particular law or a particular action or decision, but instead the party challenging the law must demonstrate that there is no conceivable, rational basis on which the state's action or classification could be based.[167]

Thus, a law or action making a classification based on a disability will survive an equal protection challenge and is subject only to rational basis review.[168] However, when the law or action also has elements that enforce protections afforded by the Fourteenth Amendment's Due Process clause or when the law or action at issue implicates some other fundamental constitutional right, it is subject to strict scrutiny.[169] Due Process claims or rights enumerated in the Bill of Rights, such as the Due Process and Confrontation Clauses of the Sixth Amendment, are deemed more fundamental by virtue of their explicit inclusion in the Constitution.[170] Due Process requires that a state "must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[171] The first requirement of the congruent and proportional test is thus satisfied by a narrow definition of a fundamental constitutional right subject to a heightened form of constitutional scrutiny.[172]

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discriminates against a suspect class if the "classification is rationally related to a legitimate governmental purpose").

165. Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001).

166. *Id.*

167. *Id.* at 367.

168. *Cleburne*, 473 U.S. at 438-39.

169. *See e.g.*, Dunn v. Blumstein, 405 U.S. 330, 340 (1975) (discussing the fundamental right to travel and freedom of movement).

170. Faretta v. California, 422 U.S. 806, 818 (1975). The court in *Faretta* stated that because the rights embodied in the Sixth Amendment "are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." *Id.* Among the rights guaranteed by the Sixth Amendment include the right of the accused to a "speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed," the right to "be informed of the nature and cause of the accusation;" the right to "be confronted with the witnesses against him," and the right to have "[a]ssistance of Counsel for his defence [sic]." U.S. CONST. amend. VI.

171. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

172. Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364-68 (2001).

2. *History and Pattern of Violations of Constitutional Rights*

The second step in applying the congruent and proportional test is to determine whether Congress sufficiently identified a history and pattern of violations of constitutional rights by the states.[173] The *Garrett* Court examined evidence of discrimination presented to or found by Congress in the course of its consideration of the ADA.[174] The *Garrett* Court stated that the record demonstrated many instances of employment discrimination against those with disabilities sufficient for Congress to make a general statement that "historically, society has tended to isolate and segregate individuals with disabilities" and that discrimination against those with disabilities is a "serious and pervasive social problem."[175] However, the Court held that the majority of the incidents in the record did not deal with the activities of the States.[176] Many incidents cited may have even amounted to unconstitutional discrimination and may have demonstrated an unwillingness of a state official to make some sort of accommodation for the disabled individual.[177] However, the evidence fell well short of "suggesting a pattern of unconstitutional legislation on which Section 5 legislation must be based."[178] The *Garrett* Court further explained that mere anecdotal evidence could not replace official legislative findings in demonstrating discrimination against the disabled.[179] Additionally, the anecdotes in the congressional record in question were submitted not to Congress directly, but to a special task force on the rights of the disabled.[180] Further, the *Garrett* Court reasoned that even if a history of discrimination in employment by the States were to have been demonstrated, there might have been a rational reason for the disparate treatment, such as a desire to conserve fiscal resources by hiring those who could readily access existing facilities without the employer having to modify them to accommodate the individuals with disabilities.[181]

Finally, the *Garrett* Court drew a parallel between discrimination considered by Congress in passage of the ADA's Title I with evidence considered by Congress in consideration of the Voting Rights Act of 1965,

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173. *Id.* at 368.
174. *Id.* at 369.
175. *Id.* (quoting 42 U.S.C. § 12101(a)(2)).
176. *Id.*
177. *Id.* at 370.
178. *Id.*
179. *Garrett*, 531 U.S. at 370.
180. *Id.*
181. *Id.* at 372.

where some states required voters to submit to a literacy test to register to vote.[182] The Court considered this too stark of a contrast and held that

> in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. These requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law. . .Section 5 does not so broadly enlarge congressional authority.[183]

The Court's holding, however, did not completely invalidate Title I, as Title I still proscribed standards for the states and allowed for recovery of money damages against private employers or individuals for employment discrimination.[184] Additionally, the *Garrett* Court expressly reserved determination of whether Title II's remedies dealing with the services, programs or other activity of a public entity was appropriate remedial legislation under Section 5 of the Fourteenth Amendment.[185]

III. ANALYSIS

In *Tennessee v. Lane*,[186] Justice Stevens wrote the majority opinion for a sharply divided court in which Justices O'Connor, Souter, Ginsberg, and Breyer joined.[187] The majority held that Title II of the ADA, as applied to the "fundamental right of access to the courts," was a "valid exercise of Congress's Section 5 authority to enforce the guarantees of the Fourteenth Amendment."[188] Justice Souter filed a concurrence in which Justice Ginsberg joined, and Justice Ginsberg filed another concurrence in which Justice Souter and Justice Breyer joined.[189] Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined.[190] Justice Thomas and Justice Scalia also each filed separate dissenting opinions. [191]

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182. *Id.* at 373-74.
183. *Id.* at 374.
184. *Id.* at n 9.
185. *Id.* at 360, n. 1.
186. 541 U.S. 509 (2004).
187. *Lane*, 541 U.S. at 512.
188. *Id.* at 533-34.
189. *Id.* at 512.
190. *Id.*
191. *Id.*

A. THE MAJORITY OPINION

The primary issue, as articulated by the majority, was whether Title II of the ADA was a valid exercise of Congress's Section 5 power, or whether it exceeded the scope of that authority.[192] The majority applied the "congruent and proportional" test articulated in *City of Boerne* to Title II's specific goals of remedying discrimination against people with disabilities in the administration of public services.[193] Because the scope and nature of the constitutional rights Title II sought to enforce went beyond equal protection of the disabled and implicated rights protected by the Due Process Clause, action taken or laws passed in violation of those rights were subject to a higher level of constitutional scrutiny than the default rational basis standard.[194] The majority determined that Congress had not only sufficiently demonstrated a history and pattern of unequal treatment of people with disabilities in the administration of public services and programs, but also that Title II was an appropriate remedy to redress this pervasive unequal treatment.[195]

1. *Title II's Valid Abrogation of Eleventh Amendment Immunity*

The majority in *Lane* reiterated that Eleventh Amendment immunity may be abrogated when Congress makes an explicit statement of its intention to do so.[196] The majority noted that this question was easily answered because the ADA specifically provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."[197]

The Court then analyzed whether Congress abrogated state sovereign immunity pursuant to a valid grant of constitutional authority under Section 5 of the Fourteenth Amendment to enforce that amendment's substantive guarantees.[198] The *Lane* majority reaffirmed that Congress may go beyond what is allowed in the Fourteenth Amendment's text itself in order to fashion an appropriate, effective remedy to deter the unconstitutional conduct, but that the proscribed remedy must exhibit a "congruence and

192. *Id.* at 513.
193. Tennessee v. Lane, 541 U.S. 509, 522 (2004).
194. *Id.* at 540.
195. *Id.* at 522-29.
196. *Id.* at 517.
197. *Id.* at 518 (quoting 42 U.S.C. § 12202 (2000)).
198. *Id.*

proportionality" with the actual harm suffered.[199] The majority also expressed that the harm Title II sought to address was the well-documented, unequal treatment and deprivation of fundamental rights of the disabled in the administration of public services and programs.[200]

2. *Title II Implicates Fundamental Constitutional Rights Protected by the Due Process Clause*

In applying the first step of the congruent and proportional test and defining the nature and scope of the constitutional right at issue, the majority in Lane differentiated Title II from Title I of the ADA.[201] The Court determined that while Title II still sought to enforce the ADA's "prohibition on irrational disability discrimination" under an Equal Protection claim, Title II also implicated more basic constitutional guarantees protected by the Due Process Clause of the Fourteenth Amendment.[202] The Court explained that the Due Process and Confrontation Clauses of the Sixth Amendment[203] as applicable to the States via the Fourteenth Amendment, required that George Lane must be afforded the right to be present at all stages of the criminal judicial proceedings against him where his absence might frustrate the goal of fairness.[204] The Court reasoned that all litigants must be afforded a "meaningful opportunity to be heard" by removing all obstacles in the way of their full participation in a court proceeding.[205] In addition, the Court also noted that Lane's Title II claim implicated the Sixth Amendment right to a jury trial, and the First Amendment right of the public to access criminal proceedings.[206] Because the discrimination suffered by George Lane as a result of his disability related to his right to physically access the courts, the *Lane* Court stated that it also necessarily implicated his Due Process rights, which were more basic

199. *Id.* at 518-19 (citing Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003); City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

200. *Id.* at 524-25

201. *Id.* at 522-23.

202. *Id.* at 523.

203. U.S. CONST. amend. VI. The amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]." *Id.*

204. Tennessee v. Lane, 541 U.S. 509, 523 (2004).

205. *Id.* (citing Boddie v. Connecticut, 401 U.S. 349 (1971))

206. *Id.*

and fundamental than the employment discrimination rights protected by Title I of the ADA.[207]

3. *Congress Demonstrated a Sufficient History and Pattern of Discrimination Against the Disabled*

In analyzing the second prong of the congruent and proportional test, the Court examined what it called a great "volume of evidence" demonstrating a pattern of discrimination against the disabled.[208] First, the Court synthesized examples of this pattern by citing to court cases demonstrating discrimination against the disabled in gaining access to the court system, depriving the disabled access to or unequal treatment of the disabled within the penal system, within the administration of public education, and in ensuring voting rights.[209] The Court also cited examples of state statutes disqualifying individuals with physical or mental disabilities from voting, marrying, and serving as jurors.[210] The majority then noted several of its own decisions evidencing discrimination against the disabled by a state agency.[211] They also made note of the state and federal court cases in which discrimination against the disabled was present in the court access context.[212]

Next, the majority examined the legislative history and record of congressional committee hearings prior to the enactment of the ADA to find a showing of a history and pattern of irrational disability-based discrimination.[213] The Court noted that despite existing state and federal attempts to address disability discrimination prior to 1990, Congress concluded that those efforts fell far short of seriously addressing the pervasiveness of discrimination against the disabled.[214] The *Lane* Court emphasized three sources from the legislative record demonstrating Congress's findings: (1)

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207. *Id.* at 522-24.

208. *Id.* at 528.

209. *Id.* at 525 n. 11-12 (citations omitted).

210. *Lane*, 541 U.S. at 524 n. 8-9 (citations omitted).

211. *Id.* at 524-25 (citations omitted).

212. Tennessee v. Lane, 541 U.S. 509, 525-26 (2004) (citations omitted); *see also* Layton v. Elder, 143 F.3d 469, 471 (8th Cir. 1998) (providing an example of a case involving a wheelchair bound litigant who "was physically unable to attend the meeting because it was held on the [inaccessible] second floor [of the courthouse]"); Matthews v. Jefferson, 29 F. Supp. 2d 525, 533-34 (W.D. Ark. 1998) (describing how the only accommodation made for a wheelchair bound litigant was to carry him to the second floor courthouse where there were no wheelchair accessible restrooms, and no arrangements were made to carry him downstairs at the end of the day); Pomerantz v. County of L.A. 674 F.2d 1288, 1289 (9th Cir. 1982) (excluding blind individuals from jury service).

213. Tennessee v. Lane, 541 U.S. 509, 527 (2004).

214. *Id.* at 526 (citing S.REP. NO. 101-116, at 18 (1990)).

general examples of unequal treatment of the disabled by States and their related political entities contained in Appendix C to Justice Breyer's dissenting opinion in *Garrett*,[215] (2) a report presented to Congress demonstrating that the disabled lacked access to seventy-six percent of public services because the programs or services were housed in physically inaccessible buildings,[216] and, (3) testimony of witnesses before congressional subcommittees describing the inaccessibility of local courthouses.[217] The majority explained that it was unnecessary that the evidence supporting a pattern of constitutional violations to be based solely on actions by the states alone.[218] As the *Lane* case in particular demonstrated, local governments are treated as an "arm of the State" for purposes of applying Eleventh Amendment immunity in the area of providing judicial services.[219] The Court cited to an example of this principle from *Katzenbach*.[220] In *Katzenbach*, the officials denying or implementing voting restrictions on racial minorities were most often city and county officials.[221] Additionally, the Court determined that the Family and Medical Leave Act, as it was upheld in *Hibbs*, applied to the states even though most of the evidence presented in support of the Act concerned constitutional violations by private employers or the federal government.[222] The *Lane* majority concluded its analysis of the evidence supporting Title II by pointing out that the evidence of the pervasiveness of discrimination was sufficient because it was incorporated into the text of the ADA itself in the statute's section on findings and purpose.[223]

4. *Title II is a Limited, Proportional Remedy to a Pattern of Unconstitutional Discrimination*

Based on its examination of the evidence presented,[224] the *Lane* Court found that Title II's requirements were congruent and proportional measures taken to enforce the right of the disabled to access the judicial

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215. *Id.* (citing *Garrett*, 531 U.S. at 379 (Breyer, J., dissenting)).

216. *Id.* at 527 (citation omitted).

217. *Id.* (citing *Oversight Hearing on H.R. 4498 Before the House Subcommittee on Select Education of the Committee on Education and Labor*, 100th Cong., 2d Sess., 40-41, 48 (1988)).

218. *Id.* at 527-28 n. 16.

219. *Id.* (quoting Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

220. *Id.* at 528 n. 16 (citing South Carolina v. Katzenbach, 383 U.S. 301, 312-15 (1966)).

221. *Katzenbach*, 383 U.S. at 312-15.

222. Tennessee v. Lane, 541 U.S. 509, 528 n. 16 (2004) (citing Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 730-35 (2003)).

223. *Id.* at 529 (citing 42 U.S.C. § 12101(a)(3)).

224. *See supra* note 208-23 and accompanying text.

system.[225] The remedy, however, was limited. While the Court's opinion in *Lane* directed states to remove physical, architectural, or legal barriers to access judicial services, the decision did not require the states to employ any means necessary to allow the disabled to have full, unfettered access to such services.[226] Instead, the Court required that states make "reasonable modifications" which would not necessarily "fundamentally alter" the service provided, and applied only if the individual seeking the accommodation would be otherwise eligible to participate in the proceeding being held in such a building.[227] Further, the *Lane* majority explained that physical modification of existing judicial facilities would only be necessary if the State could not discover a less costly way of accommodating the disabled individual, such as relocating a judicial proceeding to an accessible site, or assigning a state employee to assist the disabled individual to access the program or service.[228] Thus, the *Lane* Court affirmed the decision of the Sixth Circuit Court of Appeals that Title II of the ADA was a reasonable use of Congress's Section 5 authority to enforce the Due Process rights of disabled individuals to have equal physical and legal access to the courts.[229]

B. JUSTICE SOUTER'S CONCURRENCE

Justice Souter, joined by Justice Ginsberg, agreed with the majority's application of the congruent and proportionality test, but wrote separately to urge the Court to undertake a more "expansive enquiry" into finding evidence of discrimination against disabled individuals in a judicial courtroom or legal proceeding setting.[230] Souter reasoned that such an undertaking would uncover evidence of even greater, more offensive discrimination against individuals with disabilities, and would offer more support for Title II's remedial scheme.[231]

C. JUSTICE GINSBERG'S CONCURRENCE

Justice Ginsberg's concurrence, joined by Justice Souter and Justice Breyer, centered on the idea that maintaining a functioning federal system of government necessitated that Congress not be required to "indict" or present evidence of specific discrimination against the disabled against each

225. *Lane*, 541 U.S. at 531.
226. *Id.* at 531-32.
227. *Id.* at 532.
228. *Id.*
229. *Id.* at 533-34.
230. *Id.* at 534 (Souter, J., concurring).
231. *Id.* at 534-35.

individual state before exercising its Section 5 authority.[232] Ginsberg stated that members of Congress would be unwilling or reluctant to condemn their own state as being a violator of the constitutional rights of the disabled.[233] Justice Ginsberg then urged that the Court examine the body of evidence of discrimination against the disabled as a whole, and that this body of evidence be found sufficient to "warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order."[234] Ginsberg's argument directly addressed an argument made by Justice Scalia in his dissent in *Hibbs*.[235]

D. CHIEF JUSTICE REHNQUIST'S DISSENT

Chief Justice Rehnquist, in his dissent joined by Justice Kennedy and Justice Thomas, argued that the majority's conclusion that Title II validly abrogated the Eleventh Amendment immunity of the States was irreconcilable with the court's previous decisions and stood directly against the principles embodied in the court's decision in *Garrett* regarding Title I of the ADA.[236] Chief Justice Rehnquist contended that the majority opinion applied the "congruent and proportionality" test incorrectly.[237] He further argued that Title II was not remedial Section 5 legislation, but an attempt to rewrite the Fourteenth Amendment.[238]

Chief Justice Rehnquist conceded that defining the scope of the constitutional right at issue was more difficult than in *Garrett* because Title II involved rights protected by the Due Process Clause of the Fourteenth Amendment.[239] However, the Chief Justice condemned the majority's application of the second step of the congruent and proportionality test, stating that the majority identified "nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons."[240]

Chief Justice Rehnquist first argued that the court could not rely on overbroad, generalized evidence of societal discrimination to specifically

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232. *Id.* at 537 (Ginsberg, J., concurring).

233. *Id.*

234. *Id.* at 538.

235. *Id.* at 537. *See also* Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting). Scalia's dissent argued that in order to be subject to legislation demonstrating Congress's Section 5 power, a state may demand that it, individually be shown to have been acting in violation of the Fourteenth Amendment. *Id.* at 741-42.

236. Tennessee v. Lane, 541 U.S. 509, 538 (2004) (Rehnquist, C.J., dissenting).

237. *Id.* at 539.

238. *Id.* at 547-48.

239. *Id.* at 540.

240. *Id.* at 541.

condemn violations of the due process rights of the disabled.[241] The Chief Justice continued by stating that some of the evidence of discrimination in the fields of marriage, institutionalization laws, and public education could be relevant if the Court were considering the constitutionality of the ADA as an undifferentiated whole.[242] However, he argued that because the Court elected a more focused, "as-applied" inquiry, the evidence of discrimination that was offered was insufficient.[243] Chief Justice Rehnquist asserted that the type of generalized evidence relied upon by the majority in *Lane* was rejected by the *Garrett* Court as unsupportive.[244]

Secondly, the Chief Justice argued that the nature and content of the evidence relied on by the majority only supports discrimination by non-state governments because it is the same generalized, congressional task force evidence rejected by the *Garrett* decision as insufficient, unexamined, and anecdotal.[245] He noted that the absence of actual evidence demonstrating that the disabled were unconstitutionally denied their right of access to the court systems was "striking" and stated that neither the legislative findings nor the committee reports "contain[ed] a single mention of the seemingly vital topic of access to the courts."[246] The Chief Justice also noted that in George Lane's specific case, Lane was only arrested for failure to appear after he refused the assistance of the officers to help him to the second floor courtroom, the Tennessee court had conducted a preliminary hearing in the courthouse's first floor library to accommodate Lane, and the Tennessee court later offered to hold all subsequent court proceedings to an accessible courtroom in another county, which Lane refused.[247] Chief Justice Rehnquist used such a possibility of an alternative forum or alternative means of access to attack the sufficiency of the evidence of discrimination relied on by the majority using the Civil Rights Commission Report because the report contained "only a few anecdotal handwritten reports of physically inaccessible courthouses" without mention of whether the State could have "provided alternative means of access."[248]

Finally, the Chief Justice noted that the remedial measures created by Title II were massively overbroad and it could not be understood to be a

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241. *Id.*

242. *Tennessee*, 541 U.S. at 541.

243. *Id.*

244. *Id.* at 541-42 (citing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368-72 (2001)).

245. *Id.* at 547 (citing *Garrett*, 531 U.S. at 370-71).

246. *Id.* at 543, 546.

247. *Id.* at 543 n. 4 (Rehnquist, C.J., dissenting) (citing Petitioner's Reply Brief at 3-4, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667)).

248. *Id.* at 545.

congruent and proportional remedy.[249] Chief Justice Rehnquist argued that the "incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations" would be eliminated by applying the limited, as-applied holding articulated by the *Lane* majority only to the right of access to courthouses or court proceedings.[250] The Chief Justice wrote, "Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[251]

E. JUSTICE THOMAS'S DISSENT

Justice Thomas, in addition to joining Chief Justice Rehnquist's dissent, wrote a brief, separate dissent simply to point out that he believed *Hibbs* was wrongly decided, and would have disavowed any reliance on the *Hibbs* opinion whatsoever.[252]

F. JUSTICE SCALIA'S DISSENT

Justice Scalia's dissent was based primarily on his rejection of the congruence and proportionality test as a valid constitutional standard to measure Section 5 legislation.[253] He noted that "such malleable standards" turned into means by which judges could interject their own policy preferences, which wrongly turned the Court into "Congress's taskmaster."[254]

IV. IMPACT

The *Lane* holding was strictly limited to the right of the disabled to access courthouses and judicial proceedings.[255] After the Court's opinion was issued, disability rights advocates lauded the decision, but they also cautioned that the limited scope of the ruling could give rise to more litigation and cause great confusion about the extent to which Title II of the ADA applied to both fundamental and non-fundamental constitutional protections.[256] Others argued that the "as-applied" framework articulated

249. *Tennessee*, 541 U.S. at 548-49.
250. *Id.* at 552.
251. *Id.*
252. *Id.* at 565-66 (Thomas, J., dissenting).
253. *Id.* at 554-56 (Scalia, J., dissenting).
254. *Id.* at 556-58.
255. *Tennessee*, 541 U.S. at 531.
256. *See e.g.*, Valerie Jablow, *Court-Access Decision's Narrow Scope Worries Advocates For Disabled*, 40 TRIAL July, 2004, at 92 (posing the argument that *Lane* represents a harmful trend of narrowing the scope of the ADA).

by the *Lane* majority opened the door to greater "judicial lawmaking" and cast "a pall of unpredictability over the Court's Section 5 jurisprudence."[257]

A. UNCERTAIN FUTURE APPLICABILITY

The holding in *Lane* was limited in its applicability to future Title II claims, as the decision only allowed abrogation of state sovereign immunity in the context of disabled person's rights to physically access courthouses for purposes of participating in judicial proceedings.[258] The decision left many unanswered questions about the scope and applicability of Title II in other settings and to constitutional rights that were deemed non-fundamental.[259] Further, *Lane* made clear that any discrimination claim involving Title II of the ADA will be determined on an as-applied, case-by-case basis.[260] This interpretation of Title II does not preclude non-fundamental rights from being protected or prevent such individuals from suing the states under the section under all circumstances.[261] However, some have argued that this as-applied approach to Title II claims will "'[leave] disabled people uncertain of their rights and [leave] advocates uncertain of the results in any particular case.'"[262]

In the immediate aftermath of *Lane*, several district and circuit court cases were remanded for reconsideration in light of the decision in subject areas such as prisons, and the denial of prescription drug coverage.[263] In

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257. *State Sovereign Immunity - Congress's Enforcement Power Under Section 5 of the Fourteenth Amendment*, 118 HARV. L. REV. 258, 260 (2004).

258. Tennessee v. Lane, 541 U.S. 509, 530-31 (2004) The *Lane* majority stated:

> [w]hatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.

Id.

259. *See* David R. Fine, *Tennessee v. Lane: Court Left Issues Open*, 26 NAT'L L.J. 23 (June 7, 2004) (explaining that "the court did not answer the broader question of the application of Title II in other settings").

260. *See* Tennessee v. Lane, 541 U.S. 509, 530 (2004) (stating "nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole").

261. Marcia Coyle, *Patchwork Aftermath: Split Decision on Access to Courts for Disabled Likely to Prompt Smattering of State Laws, More Litigation*, BROWARD DAILY BUS. REV., June 1, 2004, at 8.

262. *Id.* (quoting Arlene Mayerson, directing attorney of the Disability Rights Education and Defense Fund).

263. *See* Miller v. King, 384 F.3d 1248, 1253, (11th Cir. 2004) (applying *Lane* to an inmate's claim under Title II of the ADA and the inmate's claims under Eighth Amendment protections from cruel and unusual punishment); *see also* Spencer v. Easter, No. 02-7722, 2004 WL 2093971, at *1 (4th Cir. Sept. 21, 2004) (determining that *Lane* was inapplicable because the case involved an ADA claim based on the non-fundamental right of being denied prescription drug coverage).

Miller v. King,[264] for example, a disabled prison inmate filed a Title II discrimination claim for monetary relief based on an alleged violation of the Eighth Amendment.[265] Despite the general evidence of disability discrimination in public services presented in *Lane*, the court in *Miller* was required to apply the congruent and proportional analysis specifically to the prison context.[266] The court held that applying the remedies of Title II of the ADA to the prison context would substantively rewrite the protections of the Eighth Amendment and thus fail the congruent and proportional test.[267] The Eighth Amendment protection against cruel and unusual punishment, not Due Process, was the constitutional right at issue.[268] The court wrote that the "Eighth Amendment has no effect on most prison services, programs, and activities, such as educational, recreational, and job-training programs . . . [i]n other words, the Eighth Amendment imposes a narrow restriction—'cruel and unusual'—on only a limited sphere of prison administrative conduct—'punishment.'"[269] The *Miller* court further contended that Title II encompassed prison services, programs, and activities "beyond the basic, humane necessities guaranteed by the Eighth Amendment—to disabled prisoners."[270]

Other "gray areas" where it is unclear whether a court would treat the subject matter as a fundamental or non-fundamental right include access to state parks, the ability of the disabled to utilize public transportation and streets, and education.[271] Several recent lower court decisions on disability

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264. 384 F.3d 1248 (11th Cir. 2004).

265. *Miller*, 384 F.3d at 1253. Miller also filed claims for injunctive relief under the ADA against the warden of the prison he was housed in. *Id.* at 1267. The court held that Miller was entitled to sue on the injunctive relief Title II claims. *Id.* Miller was housed in a maximum security section of the Georgia State Prison. *Id.* at 1254. The cells in the unit are so small that in order to give wheelchair bound inmates such as Miller some "minimal area in which to move around," the beds from the cells are removed on a daily basis, but Miller claimed this procedure was not being done in his case. *Id.* Miller also claimed that the toilets, showers, and other facilities in the unit were not wheelchair accessible and as such, he was denied the right to maintain basic hygiene. *Id.* Additionally, Miller claimed that he was being denied access to medical care for his paraplegic condition and denied rights afforded to able-bodied prisoners to access the prison yard one day per month. *Id.* at 1254-55.

266. *Id.* at 1273.

267. *Id.*

268. *Id.*

269. *Id.* at 1274.

270. *Id.*

271. *See* Coyle, *supra* note 261 (mentioning access to state parks as a non-fundamental right); Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 902 (6th Cir. 2004) (describing a suit by a handicapped individual under Title II because of inaccessible public sidewalks). *See also* McNulty v. Bd. of Educ. of Calvert Co., No. Civ.A. DKC 2003-2520, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) (determining that Title II could not validly abrogate state sovereign immunity under the Eleventh Amendment for a non-fundamental right claim such as education).

discrimination in an area such as education, however, indicate either an unwillingness to apply Title II's protections to non-fundamental rights, or a reluctance to make a ruling on either side of the issue.[272]

B. NORTH DAKOTA

In *Lane*, North Dakota Attorney General Wayne Stenehjem, acting in his capacity as Attorney General on behalf of the State of North Dakota, joined with the representatives of Alabama, Nebraska, Nevada, Oklahoma, Utah, and Wyoming in filing an amicus brief in support of Tennessee as the petitioners.[273] The arguments in the amicus brief paralleled the arguments in Chief Justice Rehnquist's dissenting opinion, and reflect North Dakota's views with respect to Title II before the *Lane* decision. [274] In explaining their interest in the case, the amici wrote of their "strong interest" in preserving state sovereignty and in avoiding private damage claims based on Title II.[275] They added that not only would being subject to damage suits under Title II of the ADA for inaccessible courts be "enormously costly," it would also divert funds away from remedying any incidents of discrimination towards legal costs of defending against a Title II suit.[276]

Additionally, North Dakota and the other amici contended that existing state protections against disability discrimination were sufficient to protect the rights of the disabled.[277] North Dakota's general policy of anti-discrimination prohibits discrimination on the basis of "race, color, religion, sex, national origin, age, [and] the presence of any mental or physical disability."[278] In addition to the general prohibition against discrimination against the disabled, North Dakota's statute also specifically prohibits persons engaged in the provision of public services to engage in discriminatory practices on the basis of mental or physical disability.[279] Further, any

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272. *See e.g.*, *McNulty*, 2004 WL 1554401, at *3 (holding that education was not a fundamental constitutional right); Sacca v. Buffalo State Coll., State Univ. of New York, No. 01-CV-881A, 2004 WL 2095458, at *4 (W.D.N.Y. Sept. 20, 2004) (declining to determine whether Title II of the ADA applied to employment discrimination by a public university because of the unsettled nature of such claims and the split between circuit courts on the issue).

273. Brief of Amici Curiae Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming in Support of Petitioner at 1, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667).

274. *See supra* note 236-51 and accompanying text (putting forth Chief Justice Rehnquist's arguments in his dissenting opinion in *Lane*).

275. Brief of Amici Curiae Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming in Support of Petitioner at 1, *Lane* (No. 02-1667).

276. *Id.* at 23-24.

277. *Id.* at 24.

278. N.D. CENT. CODE § 14-02.4-01 (2004) (emphasis added).

279. *Id.* § 14-02.4-15. Specifically, the North Dakota statute states that:

person with a public services or accommodations discrimination claim, presumably including the right of access to the judicial system or inaccessible courthouses, has the right under North Dakota law to file "an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed or in the district in which the person would have obtained public accommodations or services were it not for the alleged discriminatory act."[280] Claimants may bring their actions for either injunctive or equitable relief.[281]

V. CONCLUSION

In *Lane*, the Supreme Court upheld Title II of the Americans With Disabilities Act as a valid use of Congress's Section 5 power to enforce the substantive guarantees of the Fourteenth Amendment, but only as it applied to the fundamental right of disabled individuals to access the courts.[282] The ADA contains a valid abrogation of a state's Eleventh Amendment Immunity.[283] However, because of the limited scope of the Court's holding, only the right of access to the courts was upheld, and the rights of the disabled in other areas of public programs and services will be considered on a case-by-case basis.[284]

*Lesley B. Foss**

> [i]t is a discriminatory practice for a person engaged in the provision of public services to fail to provide to a person access to the use of and benefit thereof, or to give adverse or unequal treatment to a person in connection therewith, because of the person's race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance.

Id.

280. *Id.* § 12-02.4-19.

281. *Id.* § 12-02.4-20.

282. Tennessee v. Lane, 541 U.S. 509, 533-34 (2004).

283. Id. at 517-18, 534.

284. *Id.*

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